SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 13

STEPHEN R. WAINWRIGHT,

Petitioner,

—v.—

CITY OF NEW ORLEANS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF FOR PETITIONER

MELVIN L. WULF
ELEANOR HOLMES NORTON
PAUL CHEVIGNY
156 Fifth Avenue
New York, N. Y. 10010

NORMAN DORSEN
MICHAEL D. KAUFMAN
New York University
School of Law
Washington Square South
New York, N. Y. 10014

Attorneys for Petitioner

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021
of counsel

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Criminal District Court for the Parish of Orleans (R. 54-60) is unreported. The order of the Supreme Court of Louisiana denying petitioner's application for writs of certiorari, prohibition and mandamus (R. 71) is reported at 184 So. 2d 23.

Jurisdiction

The order of the Supreme Court of Louisiana denying petitioner's application for writs of certiorari, prohibition and mandamus was entered on March 24, 1966. The Petition for Certiorari was filed in this Court on June 21, 1966

and certiorari was granted on January 9, 1967. The jurisdiction of this Court rests on 28 U. S. C. 1257(3).

Questions Presented

1. When a person is stopped on the sidewalk by the police "on suspicion" and questioned, to what extent must the person cooperate? Must he answer all questions? If he has no identification, must he strip to his undershirt on the sidewalk and let the police inspect him for identifying marks, or is this an unreasonable search?

2. When this person, without identification, is mistaken for a wanted man, and he tells the police his name, address and occupation, but refuses to remove any of his clothing, can he legally be arrested "on suspicion," charged with vagrancy, and taken to jail for further investigation, or is this a denial of due process?

3. When this person arrives in the police station, does he have the right immediately to call his lawyer to prove his identity, or does he first have to submit to the removal of some of his clothing, to the inspection of his body for identifying marks, and to being booked?

4. When this person refuses, because he suffers from an unsightly skin disease, to remove his clothing and submit to this examination for identifying marks, before being allowed to call counsel to prove his identity, and the officers use force to remove his clothing, is this an unreasonable search which the person may resist?

5. When this person resists the inspection of his body by merely folding his arms across his chest in trying to

keep his clothing on, and he is convicted of the crime of disturbing the peace by assault for these actions, is this a denial of due process, in that there was a total lack of evidence of the elements of disturbing the peace by assault?

Statutes Involved

Section 42-25 of the Code of the City of New Orleans—Disturbing Public Peace:

> No person shall disturb the public peace by assaulting or beating another or by threatening to do bodily harm to another.

Section 42-85 of the Code of the City of New Orleans—Vagrancy:

> The following persons shall be guilty of vagrancy:
>
> • • • • • •
>
> (7) Persons who loaf the streets habitually or frequent the streets habitually at late or unusual hours of the night, or who loiter around any public place of assembly without lawful business or reasons to be present . . .

Statement of the Case[1]

On the night of October 12, 1964, at about midnight, petitioner, a graduate student at Tulane University Law School, left his apartment in the French Quarter of New Orleans (B. 140). About four blocks from his apartment,

[1] The symbol "B" refers to the Appendix of Respondent's "Response in Opposition to the Issuance of a Writ of Certiorari" in this Court. That Appendix contains the transcript of record of

he was stopped by two officers of the New Orleans Police Department, Officers Boepple and Otteson (B. 147). According to the officers, they wanted to question petitioner who "resembled" a composite picture of a man who had allegedly committed a murder (B. 136).[2]

Officer Boepple testified that petitioner freely gave his name (B. 139).[3] When asked where he lived, petitioner first responded, "in the French Quarter" (B. 139), and then gave his precise address, which Officer Boepple believed truthful (B. 147). When asked next whether he was carrying any identification, petitioner began to walk away. The officers stepped in his path to prevent his leaving. Petitioner again tried to walk away saying, "the law says I must only give you my name and address; that is all I am required to give you" (B. 140). The police again detained him.

Officer Boepple then asked petitioner what he was doing on the street at that time of night to which petitioner answered that he was "going to get something to eat" (B. 140). At that point Officer Boepple walked to his patrol car, returned with the composite picture, and told petitioner that "the reason we question you is because you fit

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the partial trial of predecessor charges against petitioner without which the charges at bar cannot be fully understood. The material in that Appendix was inadvertently omitted from the Transcript of Record in this case. References to the latter Transcript of Record are designated by the symbol "R".

[2] In fact, it had "never been clarified whether the man we had been looking for as the murder suspect, is the man who committed the murder. It is still an open case" (R. 25).

[3] Petitioner also mentioned that he was a law student. Boepple was sceptical because he thought petitioner, who was dressed in a white denim jacket, a T-shirt, and a pair of dress slacks, "was not dressed as a law student" (B. 141).

the description of an individual who committed a murder a week or so previous" (B. 140-141). In order to have petitioner verify that he "wasn't the subject we were looking for . . . ," Boepple asked for his draft card, but petitioner did not have it with him. The officers searched petitioner and found he had no identification whatever (B. 172, 176).

Officer Boepple told petitioner that the man they were looking for had a tattoo on his left forearm which read "Born to raise hell" and asked petitioner to remove his jacket so they could discover whether he had such a tattoo. Petitioner refused, saying, "I refuse to allow myself to be molested by a bunch of cops here on the street" (B. 141). Petitioner also said, according to Officer Otteson, that he "didn't want to be humiliated by the police" (B. 175).[4]

Officer Boepple then said that he was left with "no alternative" but to arrest petitioner and take him to the station house (B. 141).

The charges for which petitioner was arrested were vagrancy by loitering and resisting an officer (B. 148).

The charge of vagrancy by loitering was based on the fact that petitioner "was standing still for five seconds" (B. 149), that he "couldn't show me any identification to verify whom he was" (B. 149, 169) and that "he had very little funds" (B. 174).

The charge of resisting was based on petitioner's "turning and walking away" (B. 148), though the officers were

[4] Petitioner's fear of humiliation was related, among other things, to an unsightly skin ailment from which he was suffering and which would have been visible had he taken off his jacket (B. 161-162).

unable to say whether petitioner tried to walk away "before or after he was told he was under arrest" (B. 177).

When inside the patrol car and persuaded that he was actually being arrested, the petitioner said, according to the police, "All right, you stupid cops" (B. 142). Upon hearing that, Officer Boepple told petitioner that he would also be charged with reviling the police (B. 142).

When the patrol car arrived at the station house, petitioner offered to produce identification if the officers would take him home (B. 147), but the offer was rejected because "the man was already under arrest at that time" (B. 148).

The officers took petitioner into the station house and put him in the interrogation room. Petitioner immediately asked to be allowed to telephone his attorney, but was told he could not do so until he had been booked (B. 142; R. 34, 36). Petitioner was kept in the interrogation room ten or fifteen minutes (R. 36) during which time he was interrogated "about possible murder suspect" (R. 39), and then booked (R. 16, 28).

Immediately after booking, Lieutenant Martello told petitioner to remove his jacket so that the officers could see if there was a tattoo on his arm (R. 16-17, 21). Petitioner refused to remove his jacket and again demanded the right to use the telephone (R. 20). Lieutenant Martello ordered two officers to forcibly remove the jacket. Petitioner resisted by crouching in a corner, folding his arms and holding his jacket to him as the officers approached to remove it. Petitioner did not strike out or kick the officers (R. 22-23, 30), but the four or five officers now attempting to remove the jacket "got thrown around the room" through the

combination of their efforts to remove the jacket and petitioner's resistance (R. 22).[5]

After the jacket was removed and the officers found that petitioner was not tattooed, he was permitted to telephone his lawyer (R. 31). He was then taken to another police building to be photographed and fingerprinted.

Petitioner's attorney arrived at about 1:45 A.M. at the police station to which petitioner had first been taken but found he was not there (B. 98). Insistent about seeing his client, the lawyer was himself arrested, charged, and later convicted of reviling the police and refusing to move on. The latter charge was based on his refusal to leave the police station.[6]

At about 4:45 A.M. on the morning of October 13th, after petitioner and his attorney had been released from custody, petitioner was examined by his doctor (B. 163) who found evidence of injury to his shoulder, back, hand and wrist. Petitioner told the doctor that the injuries had been inflicted by the police (B. 163).

Petitioner's trial on the charges of vagrancy, resisting arrest and reviling the police was first heard on December 4, 1964, in Municipal Court. After partial testimony was heard (B. 129-134), the trial was adjourned. It was re-

[5] Two police officers from the homicide bureau who were assigned to the murder (R. 26) were called to the police station, but petitioner was forcibly searched before they arrived. When one of the arresting officers was asked whether "these two officers could have identified that murder suspect," an objection to the question was sustained (R. 34).

[6] The transcript of the attorney's trial and conviction is found at B. 91-127. The conviction was reversed on appeal.

sumed on May 7, 1965, when the court heard further partial testimony and once more adjourned the trial over objection by petitioner's lawyer (B. 149). The trial was resumed once more on May 14, 1965 (B. 151). At the close of the state's case on that day (B. 179), the three original charges were discontinued—in Respondent's words, they have been "long abandoned" (B. iii)—and three new charges growing out of the events inside the police station were lodged against petitioner. Those charges consisted of two charges of disturbing the peace by assault on police officers and one charge of resisting an officer (B. 179-180). Petitioner was subsequently convicted of those three charges (R. 40). On appeal to the Criminal District Court, the conviction for resisting an officer was reversed (R. 56), and the convictions for disturbing the peace were affirmed (R. 60). It is the convictions for disturbing the peace which are before the Court in this case.

On appeal to the Criminal District Court, petitioner claimed that his arrest was unlawful because not based upon probable cause (Petition for Certiorari, pp. 37, 38), that the search in the station house was unlawful and that petitioner had the right to resist it (*id.* at 38),[7] and that "the police refusal to allow the defendant to contact his attorney . . ." was a "violation of his constitutional and statutory right . . ." (*id.* at 38).

In his application to the Supreme Court of Louisiana for writs of certiorari, prohibition and mandamus, petitioner assigned the following errors (R. 64-65):

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[7] Citing *Wright* v. *Georgia*, 373 U. S. 284 (1963), for both these propositions.

(1) There was insufficient evidence as a matter of law to find that the defendant committed an assault on anyone.

(2) There was insufficient evidence as a matter of law to justify a finding that the defendant committed a breach of the public peace.

(3) The defendant was denied his constitutional right to due process in that:

(a) The defendant was denied his right to have counsel present from the moment of his arrest.

(b) The defendant was deprived of his right not to be subject to unlawful search.

(c) The defendant was deprived of his right to a speedy trial.

(d) The defendant was deprived of his right to an impartial trial.

The Criminal District Court held both that petitioner's arrest (R. 54-56) and the station-house search (R. 57) were lawful. The Supreme Court of Louisiana, in its order denying the writs, said that "The ruling of the Criminal District Court for the Parish of Orleans is correct" (R. 71).

Summary of Argument

I. Though petitioner adequately identified himself to police officers looking for a murder suspect, he was arrested on a baseless charge of vagrancy and taken to the police station for further investigation. There was no probable cause to arrest petitioner for either vagrancy, *Thompson* v. *Louisville,* 362 U. S. 199 (1960), or for murder, *Beck* v. *Ohio,* 379 U. S. 89 (1964). Petitioner was arrested on "mere suspicion." *Wong Sun* v. *United States,* 371 U. S. 471 (1963). The valid interests of the police could have been satisfied by alternative and constitutional means.

II. Because the search of petitioner was incidental to an unlawful arrest, it was itself unlawful, *United States* v. *di Re,* 332 U. S. 581 (1948), and could lawfully be resisted. *United States* v. *di Re, supra; Wright* v. *Georgia,* 373 U. S. 284 (1963); *John Bad Elk* v. *United States,* 177 U. S. 529 (1900). The absence of a right to resist an unlawful search encourages police lawlessness.

III. Petitioner's conviction is invalid because he was denied the assistance of counsel when the "focus" of investigation was upon him, *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), when the denial of counsel "derogated his right to a fair trial," *United States* v. *Wade,* 35 U. S. L. Week 4597, and when the denial affected "counsel's ability to assist petitioner in respect of . . . rights he did possess."

ARGUMENT

I.

Petitioner was arrested without probable cause.

The facts of this case sharply demonstrate police conduct used to evade the mandate of the Fourth Amendment. As stated by Mr. Justice Douglas in *Carignan* v. *United States*, 342 U. S. 36, 46 (1951), it is the "time-honored police method . . . to arrest a man on one charge (often a minor one) and use his detention for investigating a wholly different crime."

Thus, the police officers here had the barest suspicion, based upon a composite picture in their possession, that petitioner resembled a man involved in some ambiguous way in a murder (R. 25). Dissatisfied with petitioner's reasonable and truthful answers to questions put by them which in fact established his identity, the police arrested petitioner on a wholly unrelated and spurious charge of vagrancy by loitering in order to allow them to pursue the murder investigation in the privacy of the police station.[8]

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[8] The issue has been the subject of several studies: Secret Detention by the Chicago Police, A Report by the American Civil Liberties Union (1959); Report and Recommendations of the [District of Columbia] Commissioner's Committee on Police Arrests for Investigation (1962). See Douglas, Vagrancy and Arrest on Suspicion, 70 Yale L. J. 1 (1960).

To the extent that petitioner was first interrupted by police on the street and interrogated without probable cause, this case bears resemblance to the three "stop and frisk" cases before the Court this Term (*People* v. *Sibron*, No. 63; *People* v. *Peters*, No. 74; *Terry* v. *Ohio*, No. 67). The cases diverge, however, since the central issue here is not the use at trial of evidence seized in the course of a warrantless, non-consensual, non-probable cause street detention, interrogation, and search. Rather, petitioner was arrested precisely because the street search and interrogation, as far as the officers were concerned, was fruitless. See American

Conduct of this kind exceeds even that which this Court condemned, in a non-Fourth Amendment context, in *Culombe* v. *Connecticut*, 367 U. S. 568, 631 (1961), where petitioner was taken not before a magistrate but rather "before the New Britain Police Court on the palpable ruse of a breach of the peace charge concocted to give the police time to pursue their investigation," even though probable cause apparently did exist for the crime for which the arrest was actually made. See too *Johnson* v. *United States*, 370 F. 2d 489 (D. C. Cir. 1966); *Cook* v. *United States*, 346 F. 2d 563 (10th Cir. 1965); *U. S. ex rel. Weinstein* v. *Fay*, 333 F. 2d 815, 818-819 (2nd Cir. 1964).

The charge of vagrancy, upon which petitioner was technically arrested, was entirely frivolous. Whatever one may say of vagrancy statutes,[9] a charge based upon the observation of a man standing still in the street for five seconds (B. 149), whether or not he is carrying identification or "very little funds," is so baseless it must fall as a matter of due process. *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Fields* v. *Fairfield*, 375 U. S. 248 (1963).

Nor can petitioner's arrest be justified as validly related to the murder said to have been under investigation by the police, for there was no probable cause whatever to arrest petitioner for murder. Probable cause to arrest without a

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Law Institute: A Model Code of Pre-Arraignment Procedure (Tentative Draft No. 1), p. 95 n. 12.

[9] Two vagrancy statutes have recently been held unconstitutional. *District of Columbia* v. *Hicks*, Cr. No. DC 34194-66 (D. C. Ct. of Gen. Sess., May 4, 1967); *Fenster* v. *Leary*, No. 248 (N. Y. Ct. of App., July 7, 1967).

warrant exists when "at the moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964).

In addition to the fact that the police themselves did not claim to have arrested petitioner for murder, objective assessment of the information within their knowledge establishes conclusively that probable cause did not exist.

The facts within the knowledge of the police when they stopped petitioner were these: (1) They had been given the name of a man they believed was wanted for murder;[10] (2) They had been given a composite picture and photograph of the man; (3) They had been told that the man had a tattoo on his left forearm which said "Born to raise hell." On the other hand, the police knew nothing at all about petitioner except the suspicion, at the moment they first saw him, that he resembled the composite picture in their possession. The refusal of petitioner to expose his forearm cannot be said to have supplied the information necessary to raise the officer's belief to the level of probable cause. As the facts of the case show, the refusal was more consistent with innocent than guilty behavior. At worst, it can be said to be ambiguous conduct, but as was said in *Wong Sun* v. *United States*, 371 U. S. 471, 484 (1963), "A contrary holding here would mean that a vague suspicion

[10] In fact, it had "never been clarified whether the man we were looking for as the murder suspect, is the man who committed the murder. It is still open" (R. 25). In other words, the police were not looking for a man whom they believed had committed a murder. At most, he was wanted for questioning in connection with a murder.

could be transformed into probable cause for arrest by reason of ambiguous conduct which the arresting officers themselves have provoked."

Taken together, therefore, the police had at best a "mere suspicion," a quantity of information constitutionally inadequate for arrest. *Wong Sun* v. *United States,* 371 U. S. 471 (1963). See too *Nathanson* v. *United States,* 290 U. S. 41 (1933); *Henry* v. *United States,* 361 U. S. 98, 100-101 (1959); *Draper* v. *United States,* 358 U. S. 307 (1959); *Brinegar* v. *United States,* 338 U. S. 160 (1949).

In *Beck* v. *Ohio, supra,* the arresting officer had a photograph of the defendant, knew personally what the defendant looked like, knew that the defendant had a criminal record, and had "information" or "reports" about the defendant. On that basis, the defendant was arrested, taken to the station house, searched, and later convicted on the basis of betting slips discovered on his person. Holding the search unlawful, this Court characterized the information in the officers possession as too "scant" to uphold the warrantless arrest. "The record in this case," said the Court, "does not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him." 379 U. S. at 95.

Though the police here did not have constitutional justification for arresting petitioner, they admittedly had a knotty practical problem in police investigation. They presumably believed that they might have stumbled across a man wanted in connection with a serious crime. They did not know or even have "strong reason to suspect"[11]

[11] *Henry* v. *United States, supra* at 101.

that petitioner was their man, but they wanted to be sure; and for that they cannot be faulted. There were several options open to them, however, which would have permitted successful police work without infringing on constitutional rights. For example, one of the officers might have followed petitioner while the other secured further information from police headquarters or, even more simply, looked in a New Orleans phone book to see whether petitioner's name and address were there. Or they might have suggested that petitioner return to his apartment voluntarily to secure the identification which would have satisfied them that he was who he said he was. Indeed, petitioner himself suggested this course before arrival at the police station but the officers rejected it because "he was already under arrest." Neither of these alternatives would have given the officers the immediate satisfaction they sought, but both were reasonable and constitutional ways of achieving their goal. The police must frequently accommodate the citizen in order to remain within the perimeter of the Fourth Amendment. If the protections of privacy devised from the Fourth Amendment are to remain meaningful, they cannot be subordinated to claims of police convenience.

II.

Under the Fourth Amendment, petitioner had the right to resist the unlawful search of his person.

Because petitioner was arrested without probable cause, any search incidental to that arrest was itself unlawful. *United States* v. *di Re*, 332 U. S. 581 (1948); *Johnson* v. *United States*, 333 U. S. 10 (1948); *Trupiano* v. *United States*, 334 U. S. 699 (1948); *Henry* v. *United States*, 361 U. S. 98 (1959).[12]

Though this Court has never squarely held that one has the right to resist an unlawful search, it has said that "one

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[12] Though we contend the search was invalid because incidental to an unlawful arrest, the search was not in fact "incidental" to the arrest, unlawful or not. *Preston* v. *United States*, 376 U. S. 364 (1964); *Cooper* v. *California*, 87 S. Ct. 788 (1967). If it is said that the search was otherwise "reasonable," see *Cooper* v. *California*, *supra* at 790, because it is the customary procedure to search all prisoners in the police station (R. 16-17, 21), the short answer is that such a search is legitimated only when conducted subsequent to a lawful arrest. Thus, the search in *Cooper* was held "reasonable" only because the defendant's automobile was "validly held." 87 S. Ct. at 791.

Likewise, the search cannot be said to be validated by *Schmerber* v. *California*, 384 U. S. 757 (1966), because the decision in *Schmerber* was based on the assumption that the underlying arrest was lawful. The searches, said the Court, "depend antecedently upon seizures of 'persons' within the meaning of [the Fourth] Amendment." 384 U. S. at 767. Furthermore, a tattoo (if it had existed) would hardly "diminish" as would the percentage of alcohol in the blood. Therefore, the case at bar, assuming *arguendo* the lawfulness of the underlying arrest, is an example of one in which a search warrant should have been required since the delay necessary to obtain the warrant did not threaten "the destruction of evidence." 384 U. S. at 770. A "neutral and detached magistrate" (*ibid.*) might well have concluded that the police were mistaken in suspecting that petitioner was a murderer and he would thereby have been saved the invasion of his body.

has an undoubted right to resist an unlawful arrest". *United States* v. *di Re, supra* at 594. More recently the Court has held that, "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963).[13] Lower federal courts have held, however, that the right to resist an unlawful search is co-extensive with the right to resist an unlawful arrest. *Sparks* v. *United States*, 90 F. 2d 61 (6th Cir. 1937); *Briggs* v. *United States*, 24 F. 2d 961 (9th Cir. 1928); *Dovel* v. *United States*, 299 Fed. 948 (7th Cir. 1924).

Since it is the Fourth Amendment which limits the power of the state both to arrest and to search, *Henry* v. *United States, supra*, and since in both cases it is protection of "the privacy or security of the citizen"[14] which is at stake, the considerations which permit resistance to an unlawful arrest apply equally to resistance to an unlawful search.[15]

Admittedly, the right to resist an unlawful arrest or an unlawful search is not unlimited. The right extends only to "using no more force than [is] absolutely necessary to repel the assault constituting the attempt to arrest"[16] or, as in

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[13] See too *John Bad Elk* v. *United States*, 177 U. S. 529 (1900); *Basista* v. *Weir*, 340 F. 2d 74 (3rd Cir. 1965); *Foster* v. *United States*, 296 F. 2d 65, 67 (5th Cir. 1962); *Brown* v. *United States*, 47 F. 2d 681 (5th Cir. 1931); *Briggs* v. *United States*, 24 F. 2d 961 (9th Cir. 1928); *United States* v. *McCarthy*, 249 F. Supp. 199 (E. D. N. Y. 1966).

[14] *Henry* v. *United States, supra* at 102.

[15] The standards announced in the federal cases now of course apply to the States. *Beck* v. *Ohio*, 379 U. S. 89 (1964); *Aguilar* v. *Texas*, 378 U. S. 108 (1964); *Ker* v. *California*, 374 U. S. 23 (1963); *Mapp* v. *Ohio*, 367 U. S. 643 (1961).

[16] *John Bad Elk* v. *United States, supra* at 535.

this case, the attempt to search. Petitioner did not exceed those limits (R. 22-23):

Cross Examination of Lt. Martello.

"Q. You testified that Mr. Wainwright crouched in a corner, held his jacket to him, now what did he do when Officers O'Rourke and Gilford tried to remove it? A. He tried to keep it on by holding it.

"Q. How? A. By folding his arms. (demonstrates)

"Q. He didn't do anything else? A. No, not to my knowledge.

"Q. If Officer O'Rourke and Officer Gilford got thrown [fol. 27] around the room, it was through their own effort? A. No, it was the combined effort of Mr. Wainwright in his refusal to remove the jacket. Force was necessary to remove the jacket by the officers.

"Q. He didn't do anything but try to hold the jacket on? A. They tried to take it off, and he was trying to keep the jacket on.

"Q. He held very still? A. No, it was a struggle.

"Q. Did he strike out at the officers? A. No.

"Q. Did he kick the officers? A. I didn't see him. He could have. I didn't see him. It wasn't visible to me.

"Q. How many officers were involved in an attempt to take his jacket off of him? A. Officer Gilford, Officer O'Rourke, Officer Wilson and Mr. Kent—four."

The right to resist an unlawful arrest is recognized in 45 of the 50 states.[17] *The Right to Resist an Unlawful*

[17] Louisiana is one of the 45 states. *City of Monroe* v. *Ducas*, 203 La. 974; 14 So. 2d 781 (1943).

Arrest: An Outdated Concept, 3 Tulsa L. J. 40, 46 (1966). The reasons for this virtual unanimity are compelling and go to the heart of the purpose of the Fourth Amendment: "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California, supra* at 767.

If a citizen chooses to exercise the right to resist an unlawful search by refusing to submit to it, is it not offensive to permit him to be convicted of "disturbing the public peace," or any other offense which is a direct result of his resistance? At common law no crime was committed because the unlawful arrest and search constituted an assault, and reasonable resistance was an act of self-defense. See *John Bad Elk* v. *United States, supra*.

Any other rule would encourage police brutality, as well as wholesale violations of the Fourth Amendment. If it is unlawful to resist an unconstitutional arrest and search, it is to the advantage of the police to seize a suspect and search him by force. If contraband or other evidence of crime is found, and the suspect cannot be convicted for its possession because of the invalidity of the seizure, he can nonetheless be jailed for breach of the peace or resisting the officers.

The Court of Appeals of the State of New York, in *People* v. *Cherry*, 307 N. Y. 308, 311 (1954), a leading case establishing the right to resist an unlawful arrest, has said:

> "For most people, an illegal arrest is an outrageous affront and intrusion—the more offensive because under color of law—to be resisted as energetically as a violent assault."

There is a point at which this statement becomes true of nearly every citizen. Tolerance of high-handedness may vary from person to person, but there comes a time when every person, if he values his liberty at all, will refuse to submit. To permit such a refusal to be made unlawful is to put a premium upon official arbitrariness. The more unreasonable the actions of the police, the more likely the citizen is to resist, and the easier the conviction for resisting an unlawful arrest. Under circumstances like those in the present case, many citizens could predictably be expected to resist to some degree, and the police will in fact have created a situation in which resistance is nearly inevitable. A conviction based upon resistance to such an arrest is obtained virtually by entrapment. But for the provocative behavior of the police, there would be no crime. *Cox* v. *Louisiana,* 379 U. S. 559, 571 (1965).

It is no mere abstraction to say that to permit a criminal conviction for reasonable resistance to an unconstitutional act will encourage police abuses. If the police cannot arrest an individual except upon probable cause, their power to harass is limited. But if the police can prosecute every time their unlawful acts are resisted, they are thereby encouraged to exercise their power arbitrarily. To understand the effect of such a rule, it is only necessary to consider how different the case of *Wright* v. *Georgia, supra,* might have been had it been illegal to resist the unlawful acts of the officers. The refusal of the Negro defendants to move from a place where they had a constitutional right to be could have been charged by the police as resistance to an unlawful arrest.

To permit resistance to an unlawful search or arrest to be made criminal also puts a dangerous weapon in the hands of

the authorities for control of persons they believe to be undesirable. For example, if the police wish to disperse a group of people distributing political leaflets in public, they need only tell them to move on, under threat of arrest. If they refuse, they can be arrested, whether constitutionally or not, and all physical refusals to move can be made valid basis for conviction.

If it is said that a rule allowing resistance will encourage disrespect for the law, the answer is that the people consent to obey the lawful orders of government partly because they know they can refuse the unlawful orders. To permit that refusal is essential to the sense of personal liberty.

"The Fourth Amendment, designed to protect the people against unlawful searches, was not enacted so that citizens should accept affronts in silence. Petitioner had a right to refuse to be searched, and it would flout the purpose of the Fourth Amendment to sustain his conviction for a refusal to submit to that search, brought about solely by the arbitrary acts of the police.[18]

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[18] The U. S. Court of Appeals for the Second Circuit has recently suggested that the vitality of the right to resist an unlawful arrest is "waning." *United States* v. *Heliczer*, 373 F. 2d 241, 246 n. 3 (1967). The Court's suggestion rested on two bases: The first was the Uniform Arrest Act; but compare *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

Its second basis was Section 304(2)(a)(i) of the Model Penal Code adopted by the American Law Institute in 1958 which denies the right "to resist an arrest which the actor knows is being made by a peace officer, although the arrest is unlawful."

The debate over the issue within the A. L. I. was by no means as conclusive as the opinion in *Heliczer* would lead one to believe. For example:

"Mr. Boskey: I would either strike the standard or restore the view of what I judge is existing law, that a moderate amount of force but not an unreasonable amount may be used to resist clearly unlawful arrest." 1958 Proceedings, p. 246.

"Mr. Buchanan: I think it is rather shocking that you cannot use self-help against a fellow who wears a blue coat with

III.

Denial of petitioner's request to consult with his attorney, as guaranteed by the Sixth Amendment, prejudiced his rights during the police station confrontation and at trial.

This Court has made clear that the right to advice and aid of counsel "go[es] to the roots of our concepts of American criminal jurisprudence," *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *Powell* v. *Alabama*, 287 U. S. 45

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brass buttons simply because he has a blue coat with brass buttons." Id. at 249.

"Mr. Knapp: I just read the opinion [in *People* v. *Cherry*, 307 N. Y. 308 (Ct. of App. 1954)] through, but I don't think this prospective change of the law would be likely to have changed the situation that happened at that particular fracas. The only change that would result from this prospective change in the law would be to compound the result by putting him in jail after the doctors had failed to cure him." Id. at 251.

"Judge Halpern: But apart from that, I think that the whole principle exalts the position of a peace officer in a way which is most unfortunate. It is true that the effort here is to persuade and educate the public not to use even moderate force which may sometimes lead to more serious force, but I think there are other values involved here. And certainly in a time when we in a democratic society are trying to protect democratic values and individual freedom, to suggest to the police state that the use of police force cures everything that they do—and this carries with it some such overtone—I don't like it at all.

I find it quite shocking that even moderate force of resistance is forbidden to the citizen against a man who says he is a peace officer. If may be that in New York City and in Philadelphia peace officers are much more law-abiding than they are in other cities, but we have had some very unfortunate experiences of automobile accidents in which a peace officer happens to be involved, not while he is technically on duty but nevertheless asserting his rights, and he proceeds to arrest everybody that is involved who might be in any way the

(1932); *Avery* v. *Alabama*, 308 U. S. 444 (1940); *McNeal* v. *Culver*, 365 U. S. 109 (1961); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); *Douglas* v. *California*, 372 U. S. 353 (1963); *White* v. *Maryland*, 373 U. S. 59 (1963); *Massiah* v. *United States*, 377 U. S. 201 (1964). In particular, the Court said in *Escobedo* v. *Illinois*, 378 U. S. 478, 490-491 (1964):

> ". . . [W]here, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment.' Gideon v. Wainwright . . . ."

There can be no question that petitioner here requested counsel at a point where the "focus [was] on the accused." *Escobedo* v. *Illinois*, *supra* at 492.

The police had informed petitioner that he "fit the description of an individual who committed a murder a week

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defendant in any claim by him or who might possibly assert any claim against him.

We have had some serious cases of abuse of power by police officers in my home city. A provision of this kind would, I think, in many respects be unfortunate. Let us consider the inconsistencies we get into.

Section 304(2)(a)(i) was adopted by a close vote of 59-46. 1958 Proceedings, p. 255.

or so previous" (B. 140-141). In the absence of papers establishing his identification, they had arrested petitioner, taken him to the station house and had placed him in the interrogation room where they had questioned him "about possible murder suspect" (R. 39).[19] After fifteen minutes of interrogation, he was booked. Thereafter, he was told to remove his jacket and, upon refusal after being denied the right to telephone his lawyer,[20] several officers forcibly removed it and handcuffed petitioner. This stream of incidents is similar to those held in *Escobedo* to require the presence of counsel when requested by the accused. 378 U. S. 479.[21]

Moreover, petitioner requested counsel as soon as interrogation began with respect to one offense and after arrest with respect to other offenses. The denial of counsel at this critical stage relieved petitioner of the duty to cooperate with the police once further cooperation imperiled rights which were subject to the protection of the law.[22]

Furthermore, this Court recently held in *United States* v. *Wade*, 35 U. S. L. Week 4597, 4599 (June 12, 1967), that "the

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[19] Immediately upon being brought to the interrogation room petitioner requested counsel (B. 142; R. 34, 36).

[20] This was a second denial.

[21] "In *Escobedo* v. *Illinois*, 378 U. S. 478, we drew upon the rationale of *Hamilton* and *Massiah* in holding that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer." *United States* v. *Wade*, *supra* at 4599.

[22] *Miranda* v. *Arizona*, *supra*, decided after trial began in this case, makes this explicitly clear. While entirely dispositive of this case, *Miranda's* non-retroactivity keeps it from being operative here. *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). However, since a critical stage of the proceedings had been reached in petitioner's case, and since he requested counsel, *Miranda* is unnecessary for reversal of the conviction.

accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in Court or out, where counsel's absence might derogate the accused's right to a fair trial." *Powell* v. *Alabama, supra* at 69, found that a defendant needs "the guiding hand of counsel at every step of the proceedings against him." [23] "Both *Miranda* and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938) view counsel as an informational tool . . . ." [24]

> "[T]he principle of *Powell* v. *Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *United States* v. *Wade, supra,* at 4599-4600.

Thus, it is not only when counsel may be helpful in protecting against self-incrimination, but when his "assistance is necessary to assure a meaningful defense," *United States* v. *Wade, supra* at 4599, or to prevent "substantial prejudice to defendant's rights . . . in a particular confrontation," *id.* at 4600, that a defendant must be allowed to consult with

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[23] *Escobedo* v. *Illinois, supra* at 492, further defines "proceedings" to encompass the right to counsel at any time the process shifts from "investigatory to accusatory."

[24] Counsel Searches: A Reappraisal after Miranda v. Arizona, 67 Col. L. R. 130, 154 (1967).

counsel when he requests. Counsel may be consulted whenever he can in fact be helpful in protecting a defendant's rights, and can be excluded only when "no issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented." *Schmerber* v. *California*, 384 U. S. at 766.[25]

How then could counsel have been helpful in protecting petitioner's rights? First, counsel could have established petitioner's identity by himself identifying him or by bringing petitioner's identification to the police station.[26] Since petitioner's arrest was unlawful *ab initio*, he had a right to be released immediately and counsel could have eliminated the need for any interrogation, booking or manhandling of a law abiding citizen who was within his rights in being on the streets.

Second, counsel could have advised petitioner that his arrest was illegal, that an illegal arrest may be resisted, and that he could not be held as a vagrant. Third, and perhaps most significantly, counsel could also have protested on these grounds to the police and possibly have persuaded them to avoid the incidents at the police station.

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[25] Louisiana law at the time of petitioner's arrest appears to have afforded an absolute right to consult counsel as well as friends. Art. 230 of the Louisiana Code of Criminal Procedure provides:

> The person arrested has, from the moment of his arrest, a right to procure and confer with counsel and to use the telephone or send a messenger for the purpose of communicating with his friends or with counsel.

[26] Petitioner had offered to produce identification if the officers would take him home but this was refused (B. 147-148). At the very least, then, the officers should have allowed him to call his attorney, who could have brought the necessary identification and secured petitioner's release. This would not have "prejudicially delayed" the identification. See *United States* v. *Wade*, *supra* at 4603.

As it was, a scuffle resulted when the police insisted upon forcibly removing petitioner's jacket after he had been denied the right to call his attorney. With counsel to help identify petitioner and to explain his rights to the police, the unnecessary could have been avoided altogether.[27]

Besides counsel's duty to make clear to the police the limits allowed by the law in questioning an accused, his presence would have aided in the preparation of petitioner's defense by providing him with information to safeguard his client's "right to a fair trial at which the witnesses against him might be meaningfully cross-examined." *United States* v. *Wade, supra* at 4598. The only witnesses to the charges against appellant were the policemen who arrested and processed him and his conviction rested upon their testimony alone.

Thus, for the reasons underlying the decisions in *Escobedo, Schmerber,* and *Wade,* the denial of counsel nullifies petitioner's convictions.

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[27] "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that the desired evidence might be obtained." *Schmerber* v. *California, supra* at 770-771. Although the intrusion in *Schmerber* was to the interior of the body, the same principles presumably apply to surfaces not customarily exposed or whose exposure under the circumstances offend common notions of privacy.

CONCLUSION

For all the reasons stated above, petitioner's convictions should be reversed.

Respectfully submitted,

MELVIN L. WULF
ELEANOR HOLMES NORTON
PAUL CHEVIGNY
156 Fifth Avenue
New York, N. Y. 10010

NORMAN DORSEN
MICHAEL D. KAUFMAN
New York University
School of Law
Washington Square South
New York, N. Y. 10014

Attorneys for Petitioner

MARVIN M. KARPATKIN
660 Madison Avenue
New York, N. Y. 10021
of counsel

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